

**APPLICATION FOR  
DISTRICT COURT JUDGESHIP**

**A. PERSONAL INFORMATION**

1. Full Name: Michele Reinhart Levine
2. Birthdate: [REDACTED]
3. Home Address: [REDACTED]
4. Email: [REDACTED]
5. Phone: [REDACTED]
6. Judicial Position: District Court Judge, Eighth Judicial District, Cascade County, Montana.
7. The date of U.S. Citizenship is the same as my birthdate.
8. My Montana residency began in 1985. My early years were spent in Washington State, while my mother, (a Montana resident), was attending graduate school.

**B. EDUCATIONAL BACKGROUND**

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Name	Location	Date of Degree	Type of Degree
Park High School	Livingston, MT	1998	H.S. Diploma
College of St. Benedict	St. Joseph, MN	Transferred to Carroll College	
Carroll College	Helena, MT	2002	B.A.
University of Montana	Missoula, MT	2006	M.S.
Alexander Blewett III School of Law	Missoula, MT	2012	J.D.

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

Alexander Blewett III School of Law, University of Montana

- Recipient of American Bar Association Janet Steiger Fellowship (2010)
- Marge Hunter Brown Research Assistantship (2010-2011)
- Robert D. Corette Law School Scholarship (leadership and public service) (2011)
- Justice William E. Hunt, Sr. and Mary V. Hunt Scholarship (leadership and public service)(2011)
- Member of ABA Negotiations Competition Team coached by Klaus Sitte
- Natural Resource Conflict Resolution Certificate

Carroll College:

- Member of Award-winning Speech and Debate team

**C. LEGAL AND PROFESSIONAL EXPERIENCE**

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

Employer	Position	Dates
Cascade County Attorney's Office	Deputy County Attorney	5/2021 to present
Eighth Judicial District, Cascade County	District Court Judge	11/2020 to 4/2021
Linnell, Newhall, Martin, & Schulke, P.C.	Law Partner/Shareholder	1/2018 to 11/2020
Linnell, Newhall, Martin & Schulke, P.C.	Associate Attorney	9/2012 to 12/2017

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

Court or Administrative Body	Date of Admission
Montana State Bar	2012
U.S. District Courts, District of Montana	2012
Montana Workers' Compensation Court	2012
Chippewa Cree Tribal Court	2015

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc.).

As a District Court Judge, from November 2020 through the end of April 2021, I handled high volumes of criminal felony cases relating to criminal possession of dangerous drugs, assaults, property crimes, child abuse and neglect cases, search warrants, arrest warrants, petitions to revoke suspended sentences, and more. The criminal and child abuse cases take up the bulk of a judge's time in the Eighth Judicial District with the sheer volume of paperwork and court hearings including initial appearances, arraignments, change of plea hearings, sentencings, revocations, evidentiary and dispositional hearings, search warrants, arrest warrants, bail hearings, fitness to proceed hearings, status hearings, and trials. I worked on civil matters sometimes in the evenings and on the weekends, due to the heavy case load, including pro se family law cases, parenting plans, dissolutions, guardianships, and other civil matters. Calls for search and arrest warrants would also occur in the evenings and on weekends at all hours of the day or night. I also handled a commercial lease dispute, a civil jury trial regarding negligence and contract claims, probate cases, guardianships, and an involuntary commitment. I do not know the exact percentage of the types of cases I handled but would estimate that it was consistent with the percentages reported for the Eighth Judicial District Court in the recent past. In the Eighth Judicial District in 2019, there were 5,700 District Court cases, and the percentages were follows:

- 600 were abuse and neglect cases were 10% of the cases.
- Civil cases were 24%.
- Criminal cases were 33% (of which investigative and search warrants were 10%).
- Domestic Relations cases were 20%.
- Probates were 6%.

In the Eighth Judicial District in 2020, there were 6,025 District Court cases, and the percentages were approximately as follows:

- Criminal cases: 1349 (22%)
- Child abuse and neglect: 441 (7%)
- Civil: 1340 (22%)
- Domestic Relations: 893 (14.8%)
- Probates, guardianships, conservatorships, and other cases made up the rest of the case load.

Prior to being a judge, my law practice included complex civil litigation. Ninety percent of my civil cases included a mix of workers' compensation cases, motor vehicle crashes, and insurance litigation. My case load included disputed medical causation matters such as toxic chemical exposure, back injuries, brain injuries, farm and ranch injuries, paraplegia, and assisting surviving spouses and/or children with the work-related death of a loved one. Many of these cases involved substantial amounts of medical research and written reports establishing medical causation; summary judgment briefing; and motions *in limine*. Over the years, I analyzed thousands of pages of medical records and discovery materials. I represented a wide range of people, including law enforcement officers, certified nursing assistants, electricians, fire fighters, office workers, plumbers, restaurant workers, truck drivers, construction workers, and heavy-duty laborers. Approximately 10% of my current case load

was pro bono work, including disputed parenting plans, dissolutions, and guardian ad litem matters.

14. **Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etcetera.**

**Missoula County Attorney's Office, Missoula, MT, May 2011 - May 2012**

*Legal Intern*

I handled all aspects of misdemeanor criminal cases for Missoula County. I processed and completed discovery and filed witness and exhibit lists. I negotiated plea agreements with defense attorneys; conducted legal research; wrote motions and briefs; represented the State at trials and hearings in Justice Court and prosecuted a felony DUI before a jury in District Court under the supervision of a Deputy County Attorney.

**Department of Natural Resources and Conservation (DNRC), Missoula, MT, Summer 2011**

*Legal Clinic Student*

I researched and wrote legal memos on laws relating to DNRC, open meeting laws, and workers' compensation coverage for volunteer firefighters. I gained knowledge and experience with school trust laws and management, road easements across State land, and forest fire-fighting laws.

**Montana State Representative, Missoula, MT, Jan. 2007 - 2012**

*Three-Term State Representative, House District 97*

I researched, drafted, introduced, and passed many pieces of legislation on wide ranging topics. The majority party appointed me to be minority vice-chair of the Local Government Committee. I participated in lengthy hearings and scrutinized high volumes of legislation and public comments. I cross-examined witnesses; delivered speeches at legislative hearings and floor sessions; and was involved with legislation in numerous areas including insurance, labor, banking, land use planning, local government, natural resources, criminal statutes, and constitutional law. This experience fueled my passion for public service. I enjoyed teaching citizens about the legislative process and working with people from across Montana to solve all kinds of policy problems.

**Montana Department of Justice, Helena, MT, Summer 2010**

*American Bar Association Janet Steiger Anti-Trust and Consumer Protection Fellow*

I researched and wrote legal memos on anti-trust law, consumer protection, and ballot access. I wrote a successful appellate brief on behalf of the State in a criminal stalking case. I also researched and wrote a legal memo regarding a fraudulent telemarketer's compliance with a consent decree.

15. **Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.**



As a District Court Judge, I regularly presided over court hearings, primarily on Wednesdays, Thursdays, and/or Fridays of each week. There were some weeks where I handled between 25 to 50 hearings. I presided over two criminal jury trials and one civil jury trial in addition to bench trials and many criminal and civil hearings.

Prior to being a judge, I appeared in District Court in pro bono matters including hearings on orders of protection, parenting plans, dissolutions, guardian ad litem proceedings, and in civil cases. My civil cases were in State Court, Federal Court, and in the Workers' Compensation Court. I frequently participated in mediations with mediators from the Department of Labor and Industry. As a student prosecutor, I successfully prosecuted a felony DUI before a criminal jury, as well as misdemeanor trials before the Justices of the Peace. I handled several bench trials in Workers' Compensation Court.

16. **If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases. None.**
17. **Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.**

As a judge, I was presented with the novel and important issue of whether the Cascade County Detention Center's denial of Zoom (video conference) meetings between a criminal defendant and public defender on the weekend before trial, interfered or not with the Defendant's Sixth Amendment right to effective assistance of counsel (and preparation for trial) during the ongoing Covid-19 pandemic. This dispute was time sensitive. The hearing required detailed testimony from the Sheriff and Undersheriff regarding the reasons for no longer being unable to accommodate video conference meetings on weekends. Pursuant to *Turner v. Safely*, 482 U.S. 78 (1987), I held that the Detention Center's regulation of not being able to continue accommodating Defendant/Attorney contact by Zoom was for a legitimate penological interest because of the Detention Center's shortage of Detention Officers, (being over a dozen personnel short to fully staff the jail). At least two detention officers are required to staff a zoom session between a Defendant and an attorney. In contrast, in an in-person meeting, the defendant could be placed in a locked meeting room with a divider, which protected the attorney and did not require ongoing constant supervision by Detention staff. Furthermore, the Defendant and the Public Defender would be (and ultimately were) right next to each other at trial without a glass divider. The risk of exposure to the coronavirus was higher at trial than at the jail. For those reasons, I held that the regulation of providing for in-person meetings between attorneys and defendants prior to trial satisfied the Defendant's ability to have effective assistance of counsel at trial.

Secondly, as a judge, I handled a civil matter dating back to 2003, with nearly twenty years of complicated factual background information involving separate prior court matters. An attorney filed a claim against his attorney malpractice insurance carrier for alleged insurance bad faith and breach of contract. The insurer filed cross claims. I granted partial summary judgment to the insurer in part. Regarding remaining claims where there were genuine issues of material fact in question, summary judgment was denied.

Third, as a judge, I presided over a four-day civil jury trial, where one defendant, was included in a settlement prior to trial and a separate Defendant did not settle and proceeded to trial. I allowed the affirmative settled party defense to go to the jury, pursuant to Section 27-1-703, MCA, without allowing the parties to use the term “settled” pursuant to the Montana Rules of Evidence. I allowed the affirmative defense to be presented to the jury, over the objection of the plaintiff, in compliance with the statute and case law. The matter involved over thirty jury instructions and a complex special verdict form. The jury found the Defendant that went to trial to be 95% at fault. After the trial, the Defendant told me that I handled the trial in a very fair, clear, and decisive manner from his perspective.

18. **If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.**

Montana Trial Trends, Summer 2015, Legislative Update  
Montana Trial Trends, Summer 2018, Independent Medical Examinations

19. **If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.**

On April 24, 2020, I presented on the best practices and ethical duties for managing client contacts from the initial intake meeting through completion of the case, for the Montana Trial Lawyers.

20. **Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.**

As a private attorney, I regularly logged at least 50 hours of pro bono service per year over the last five years. As a District Court Judge, I presided over numerous matters involving pro bono or pro se litigants. Prior to being a Judge, on behalf of the Cascade County Law Clinic and Montana Legal Services Association, I handled several pro bono matters. I represented a parent in a contentious parenting plan dispute for approximately two years. I have helped victims of domestic violence obtain temporary and permanent orders of protection and have assisted with a dissolution of marriage involving domestic violence. In addition, I served as a guardian ad litem in a parenting plan dispute involving jurisdictional questions and the Indian Child Welfare Act. I also served as guardian ad litem in a contentious parenting plan matter involving allegations by the mother that the father had sexually assaulted their toddler. The case involved intensive interviewing of medical providers, mental health providers, law enforcement, social workers, and friends and family members of the parties.

21. **Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.**

- o Cascade County Bar Association, *Member*, 2012 to present
  - o Montana Bar Association, *Member*, 2012 to present
  - o Workers Injury Law & Advocacy Group (WILG), *Member*, 2012 to 2020
  - o Montana Trial Lawyers Association, *Member*, 2012 to 2020
22. **Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received. None.**
23. **If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.**

District Court Judge, Eighth Judicial District, November 2020, through the end of April 2021. Each Judge in the 8<sup>th</sup> Judicial District has well over 1,000 cases.

24. **Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.**

My professional work experience includes working with farmers, ranchers, and landowners on protecting their senior water rights, water quality, and surface owner rights in split estate situations when the surface owners did not own their mineral rights. I also worked with landowners and the Stillwater Mining Company on implementation of the Good Neighbor Agreement in Stillwater and Sweetgrass Counties, which resulted in the Company earning awards for environmental stewardship. I worked with agricultural producers to successfully advocate for country-of-origin labeling, so customers know where their beef comes from.

I worked with business and labor interests as a member of the Legislature's Business and Labor Committee for three legislative sessions, dealing with multiple areas of law including regulations for beer, wine, and liquor, professional licensing requirements, gaming, horse racing, workers' compensation insurance, and more. I supported bi-partisan measures for economic development. For example, while I was in the legislature, brewery laws were expanded to allow expansion of the brewery industry in Montana. Grant funding was maintained for small business development.

As a land use planner, I worked with agricultural landowners, business developers, and citizens on enabling responsible subdivision development. As a member of the Cascade County Zoning Board of Adjustments, I supported numerous value-added agricultural projects and small business development projects that came before the Board. As a former business owner, and a former non-profit board member, I have dealt with employment disputes, implementation of human resource policies, potential litigation exposure, and regulatory compliance issues. Having interviewed many business attorneys, I know that parties regularly want two things from the Courts: predictability (following precedent); and they want Judges to issue timely decisions.

As a Judge, I worked diligently to follow the statutes and to get orders issued. I issued summary judgment in favor a business in a commercial lease dispute in a case that had been pending for many months prior to my arrival. I set several civil trials within nine months of the scheduling conference, at a time when many civil cases are waiting a year or two for a trial date. Should I be

returned to the bench, I will continue to work hard to get the parties timely answers, pursuant to Montana law, and the Montana and U.S. Constitutions.

#### **D. COMMUNITY AND PUBLIC SERVICE**

25. **List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.**

- o Kairos Youth Homes, *former Board Chair/member*, 2012 to Nov. 2020
- o Junior League of Great Falls, *Past President, President-Elect, Membership Chair, Nominating Chair*, 2012 to 2019
- o Cascade County Zoning Board of Adjustments, *Vice Chair/Member*, 2018 to Nov. 2020
- o Montana Board of Environmental Review, *Member*, 2015 to 2017

For Junior League of Great Falls, I chaired meetings, organized volunteer and membership events, edited organizational documents and policies, attended leadership conferences, assisted with placement of new board members, participated in fundraising activities, and volunteered at the Children's Museum of Montana, Toby's House, and the Science, Technology, Engineering, Math (STEAM) Expo for the students at Great Falls Public Schools.

I served as a board member (and former board chair) of a local non-profit youth home organization, Kairos Youth Services. Kairos serves young people that have been typically placed by the Montana Child and Family Services Division, or by juvenile probation officers. Through the Chafee Foster Care Independence Program, Kairos teaches life skills to foster care young people for prepare them for their transition into adulthood. These services have helped struggling students learn the tools needed to secure housing, jobs, and college opportunities. My board member activities included reviewing financial information, the organization's status, human resource challenges, and regulatory compliance. We made decisions to benefit the organization and follow its mission.

In 2018, the Cascade County Commissioners appointed me to the Cascade County Zoning Board of Adjustments. In this position, I served as Vice Chair and applied the zoning regulations and zoning laws to special permit applications, with input from the project sponsors, County planning staff, public and agency comments, and from the Cascade County Attorney's office. I chaired hearings and directed citizens to keep comments relevant and within the Board's jurisdiction. I voted for and supported numerous projects, including value-added agricultural developments.

26. **List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.**

From November 2020 through April 2020, I served as a District Court Judge, having been appointed by the former Governor Bullock. The Senate chose not to confirm.

I was appointed by the Cascade County Commissioners to the Cascade County Zoning Board of Adjustments (2018 to 2020), as noted above.

Former Governor Bullock appointed me to the Montana Board of Environmental Review, and I served in that role from 2015 to 2017.

From 2007 to 2012, I served three terms as a legislator in the Montana House of Representatives, for House District 97, in Missoula County. I am familiar with the elements of campaigning for office such as: raising money, knocking doors, organizing fundraisers, and visiting with voters.

#### **E. PROFESSIONAL CONDUCT AND ETHICS**

27. **Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.** No.
28. **Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.** No.
29. **Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.** No.
30. **Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).** No.
31. **Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.**  
No



## **F. BUSINESS AND FINANCIAL INFORMATION**

32. **Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge. No.**
33. **Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? Yes.**
34. **Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? No.**

## **G. JUDICIAL PHILOSOPHY**

35. **State the reasons why you are seeking office as a district court judge.**

I am seeking to regain the position of District Court Judge for several reasons. My many supporters have urged me to re-apply and to campaign for the position because they know how hard I will keep working to serve the people, and how much I care about our community. I want Cascade County to be a safe place to work, play, and raise a family. From my involvement with local non-profits, I was somewhat aware of the amount of child abuse and neglect and crime in our community. That awareness was further impacted by two key events in Great Falls in recent years: 1) the death of Tony Renova (age 5) in November 2019; and 2) the shoot out across from a local elementary school playground, between a triple homicide suspect and law enforcement officers, just a few hours before school started in December 2019. That event shut down the school for the day and caused the cancellation of the Christmas program. These two events hit me hard regarding the need to protect the safety of our community and children.

At the Court, I regularly saw child abuse and neglect cases, and criminal cases such as criminal possession of dangerous drugs, assaults, and property crimes. Many of these cases are driven by mental illness and substance abuse. By getting at root causes with successful treatment of mental illness and chemical dependency and accountability, we have seen people become productive members of society again. Successful rehabilitation can reduce crimes and make Cascade County safer.

As a Judge, I made a difference in the lives of others by listening deeply and carefully to all sides, following the law, reaching reasoned conclusions, protecting constitutional rights, and keeping safety in mind. That is why I gained the support of law enforcement officers, prosecutors, public defenders, civil attorneys, and community leaders. Ultimately, the Montana Constitution puts the decision in the hands of the voters in 2022 regarding which Judge will oversee Department A of the Eighth Judicial District. I will continue to seek the support of the voters of Cascade County to continue being of service.

**36. What three qualities do you believe to be most important in a good district court judge?**

**Dedication** - An energetic person with a strong work ethic is needed to tackle the heavy dockets. Judges must sometimes be willing to show up early and stay late to get the job done. I did that as a Judge. Given the crushing workload, there is a need to move the Court's business along in a timely fashion by running efficient hearings, which I did. Parties want and need decisions one way or another for closure or appeal purposes. Justice delayed can be justice denied.

**Civility** - Judges see the good, the bad, and the ugly. Sometimes parties lose their tempers whether it be in person or in writing. Lately, with frequent online Zoom hearings there are sometimes glitches and delays. It takes patience to handle these situations while remaining calm. I kept my calm even when getting yelled at. I kept things professional and was not harsh or demeaning to people who appeared before me. Decorum and civility from the judge can set the tone for the parties. People can still disagree without being disagreeable.

**Incisiveness** - Judges need to intelligently analyze the facts, decide what is relevant, apply the applicable law, and reach a reasoned conclusion. Judges must make tough calls, including how to sentence duly convicted defendants. I made these tough calls to send people to the Montana State Prison or the Department of Corrections, pursuant to plea agreements, and to punish and rehabilitate Defendants. Judges also need good judgment to do what is right and just, even when the decision is difficult or unpopular.

**37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?**

A Judge must follow the plain meaning of the statutes and must follow precedent set forth in case law from the Montana Supreme Court and the U.S. Supreme Court. Stare decisis is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827-828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). The U.S. Supreme Court has held that "special justification-over and above the belief that the precedent was wrongly decided" is required to overturn precedent. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455-456, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463, 472, (2015). In Montana, "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *ALPS Prop. & Cas. Ins. Co. v. McLean & McLean, PLLP*, 2018 MT 190, 30, 392 Mont. 236, 247, 425 P.3d 651, 659, (2018) citing Section 1-2-101, MCA.

"If a precedent of this Court has direct application in a case yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.



Ed. 2d 526 (1989). "[R]eliance upon a square, unabandoned holding of the Supreme Court is always justifiable reliance." *Quill Corp v. North Dakota*, 504 US 298, 321, (1998) (Scalia, J., concurring in part and dissenting in part.)

For the aforementioned reasons, I have followed and will continue to follow the statutes as written and directly controlling precedents as set forth by the higher Courts. Having been a former lawmaker, I absolutely know that it is not a Judge's place to make law. A Judge must also not insert or omit language in a statute. It is not a District Court Judge's job to overrule prior cases. That role belongs to the higher courts. For cases where the facts are distinguishable from directly controlling precedent, I will follow the statutes, cannons of statutory construction, related case law on point, and the U.S. and Montana Constitutions.

#### H. MISCELLANEOUS

38. **Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.**

Typically, judicial orders are not "entirely" written by the Judge and may include using draft orders or findings from the parties, legal research and draft language from the law clerk, and proofreading and formatting from the judicial assistant. Thus, even Judicial Orders mostly written by me, would not satisfy this criterion of being written "entirely" by me. For those reasons, I have submitted my prior writing sample regarding a motion in limine in a tractor trailer fatality case, where the client (a Montana resident) was injured by a distracted truck driver on the Interstate in Wyoming. In that case, the driver and front passenger survived, and the rear passenger was killed. I have also submitted a sample Criminal Order that I issued, which was written in collaboration with my judicial assistant.

39. **Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.**

Judge Elizabeth Best 415 Second Ave. N. Great Falls, MT, 59401	Judge John Parker 415 Second Ave. N. Great Falls, MT, 59401	Judge John Kutzman 415 Second Ave. N. Great Falls, MT, 59401
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### CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

May 28, 2021  
(Date)

Michelle R. Levine  
(Signature of Applicant)

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A signed original **and** an electronic copy of your application and writing sample must be submitted by  
***5:00 p.m. on Tuesday, June 1, 2021***

**Mail the signed original to:**

Hannah Slusser  
Governor's Office  
P.O. Box 200801  
Helena, MT 59620-0801

**Send the electronic copy to:** hannah.slusser@mt.gov

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*Admitted Pro Hac Vice*  
*Attorneys for Plaintiff Kayla Lemmings*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

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BRIAN J. SILVERTHORN,	)	
Plaintiff,	)	
	)	Civil Action No. 18-CV-209-J
vs.	)	
	)	
KILLPACK TRUCKING, INC., and	)	
JAYSEN THOMPSON,	)	
Defendants.	)	

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KAYLA LEMMINGS,	)	
Plaintiff,	)	
	)	Civil Action No. 18-CV-210-J
vs.	)	
	)	
KILLPACK TRUCKING, INC.,	)	
Defendants.	)	

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PLAINTIFF KAYLA LEMMINGS' RESPONSE IN OPPOSITION TO  
DEFENDANT KILLPACK'S MOTION IN LIMINE  
REGARDING CELL PHONES

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COMES NOW, Plaintiff Kayla Lemmings by and through her counsel of record, Stinson Law Group, P.C., and Linnell, Newhall, Martin & Schulke, P.C., and Plaintiff Bryan Silverthorn, by and through his counsel, Karpan & White, P.C., and Brain Injury Law of Seattle, and hereby responds in opposition to Defendants' motion in limine regarding Jaysen Thompson's multiple cell phones. Defendants filed a motion on July 17, 2020, seeking to exclude from the jury the relevant and admissible evidence of Thompson's multiple cell phones.

#### APPLICABLE LAW

A motion in limine should not be used to resolve factual disputes or weigh evidence. *See C & E Servs., Inc. v. Ashland, Inc.*, 539 F. Supp. 2d 316, 323 (D.D.C. 2008). Generally, relevant evidence is admissible in a trial and irrelevant evidence is not admissible. *F.R.E. 402*. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *F.R.E. 401*. Relevant evidence may be precluded, however, where "its probative worth is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." *F.R.E. 403*. "Evidence is not unfairly prejudicial merely because it damages a party's case." *See Walton v. N.M. State Land Office*, 259 F. Supp. 3d 1242, 1266, (10<sup>th</sup> Cir. 2016) citing *United States v. Caraway*, 534 F.3d 1290, 1301 (10<sup>th</sup> Cir. 2008); *United States v. Curtis*, 344 F.3d 1057, 1067 (10<sup>th</sup> Cir. 2003); *United States v. Martinez*, 938 F.2d 1078, 1082 (10<sup>th</sup> Cir. 1991). Rather, "[t]o

be unfairly prejudicial, the evidence must have 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *United States v. Caraway*, 534 F.3d at 1301 (quoting Fed. R. Evid. 403 advisory committee's note). Defendants have not met their burden of establishing an improper or prejudicial basis to exclude law enforcement's discovery of Thompson's possession of three or four cell phones in his commercial vehicle.

### DISCUSSION

1. Evidence Regarding Thompson's multiple cell phones is relevant regarding Thompson's credibility.

Pursuant to *F.R.E. 611*, a witness's credibility is part of the scope of examining witnesses and presenting evidence. "The credibility of the witness is always relevant in the search for truth. Evidence is not unfairly prejudicial simply because it is damaging to an opponent's case." *Slavin v. Garrison Prop. & Cas. Ins. Co.*, 805 Fed. Appx. 561, 562, (10<sup>th</sup> Cir. 2020).

Unfavorable facts are insufficient to establish prejudice or confusion. Merely because the information is damaging to their case, Defendants wish to hide relevant and admissible law enforcement investigation details from the jury that Thompson traveled with three or four cell phones in the cab of his commercial motor vehicle. Thompson admitted that he had three or four cell phones in his vehicle, in a shoe box. He alleged they were broken and that he did not recall the phone numbers. *Thompson Deposition.*, pp. 89-93. These are relevant credibility issues. Since the Defendants chose not to preserve the cell phones (a potential spoliation issue), Plaintiffs and Defendants are unable to independently verify the veracity of Thompson's statements

that the phones were broken and unusable. When Defendants withhold relevant evidence, an adverse inference jury instruction is appropriate that the evidence withheld by Defendants was unfavorable to Defendants.

It is for the jury to determine the credibility of Thompson's statements about his possession and use of his three or four phones. Plaintiffs and the jury have a right to know what Thompson was doing with his three or four phones both on the day of the crash, as well as his habits of conduct on the days and months leading up to the crash. See *F.R.E.* 406 regarding evidence of habits and routines. The jury needs to be able to hear his testimony on these topics, observe his body language, and determine his truthfulness. It is a fundamental question for the jury whether his many phones played a role in his distraction and whether Thompsons' statements are truthful regarding his conduct. It is also fair game to ask Thompson why he was traveling with several phones in his truck, when he could have stored the allegedly broken phones at his home in Idaho, with his wife.

Thompson's deposition testimony about his phones and phone use also conflicts with his statements to law enforcement. These are critical credibility matters. On May 17, 2018, Wyoming Highway Patrol Trooper Robert King, stated in a sworn affidavit as follows.

I made contact with the driver of the Freightliner, Mr. Jaysen Thompson, who informed me that he was traveling at a speed of 65 miles per hour and that he had looked down to check his cell phone to check a text and when he looked back up he was unable to avoid the Chevrolet Blazer.

See Trooper Robert King's Aff., ¶ 5 (App. 1). See also the notes from Trooper

Tyler Matheney, who would testify at trial that:

During a search of Vehicle #1 the only items of interest which were discovered inside the vehicle were several cell phones which were resting on the floor between the front driver and passenger seats. These items were not seized but they are of importance because the Driver of Vehicle #1 (Thompson) stated on scene he was looking at a cell phone just before the crash took place.

See App. 2. (Trooper Matheney's Supplemental Notes, Lemmings 0014, emphasis added). Just prior to the crash, was Thompson checking text messages and using data on three to four phones? If yes, his level of distraction could be multiplied by each phone demanding his attention. Thompson indicated he has Bluetooth, so he does not handle or touch the phone. See Thompson Depo. 43: 1-16. If he is using multiple phones, does Bluetooth technology through the vehicle attach to multiple phones, or is it just linked to one phone? It is relevant to why Thompson may be needing to touch phone screens if he is using multiple phones without hands free technology. In contrast to what Thompson said to Trooper King, he said in his deposition something different:

I was thinking of what time it was, and I normally wouldn't -- just reach over and press the button on the back of the phone to illuminate it so I could glance down and see what time it is to keep my hands on the wheel and watch the road so I stay aware.

...

And when I reached down for the phone to tap the power button, it wasn't there. And when I saw the traffic ahead of me, a semitruck was moving left, and in my mind, I was thinking my following distance opened up that much more. So I glanced down, shouldn't hurt, and as I was, -- as this was going on, and I was reaching down, the phone wasn't there, so I glanced down at the pocket under the stereo in the cup holder; it wasn't there.

See Thompson Depo. 72: 1-25. This statement differs from what Thompson conveyed to Trooper King about trying to check a text message, which gets at his



credibility and truthfulness. He later said that, after the crash, he found his phone on the floor. *Id.*, 73:17-18. Was the phone perhaps one of the four phones in the shoe box on the floor that he was trying to reach when he slammed into the Chevy Blazer? The presence of multiple phones and their use by Thompson is a credibility issue for the jury to decide.

**2. Evidence Regarding Thompson's multiple cell phones is relevant and admissible regarding foreseeability.**

The conduct and characteristics of the driver leading up to the crash are mandatory for the jury to consider. The skill, or conversely, lack of skill and distraction of the driver, are also part of the circumstances surrounding this crash. *Cervelli v. Graves*, 661 P. 2d 1032, 1036-1037 (Wyo. 1983). "The issue of proximate cause is generally one to be decided by the jury, and resolution of that issue depends on the foreseeability of the risk presented by the actor's conduct." *Endresen v. Allen*, 574 P.2d 1219, 1222, ¶ 9 (Wyo. 1978) ("[W]hat is reasonably to be foreseen is generally a question for the jury.") According to one respected commentator:

The central goal of the proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his negligent conduct. Judicial decisions about proximate cause rules thus attempt to discern whether, in the particular case before the court, the harm that resulted from the defendant's negligence is so clearly outside the risks he created that it would be unjust or at least impractical to impose liability....The most general and pervasive approach to proximate cause holds that **a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct.** Conversely, he is not a proximate cause of, and not liable for injuries that were unforeseeable. This does not mean that the defendant must be the sole proximate cause of the plaintiff's injury. On the contrary, several wrongdoers are frequently proximate causes of harm.

Dan B. Dobbs, *The Law of Torts* § 180, at 443–44 (2000) (emphasis added, footnote omitted). “The ultimate test of proximate cause is foreseeability.” *Killian v. Caza Drilling, Inc.*, 2006 WY 42, ¶ 20, 131 P.3d 975, 985 (Wyo. 2006); *Wood v. CRST Expedited, Inc.*, 2018 WY 62, ¶ 19, 419 P.3d 503, 511–12 (Wyo. 2018).

Plaintiffs must prove that Defendants had a duty to protect the safety of other vehicles on the highway. A key piece of the duty element of negligence is establishing that the foreseeability of Defendants' actions could lead to harm to those within the zone of danger. See *Palsgraf v. Long Island Railroad Co.*, 248 N. Y. 339, 162 N.E. 99 (1928). The foreseeability “zone of risk” here includes the possession and potential use of multiple phones while driving a commercial vehicle.

The primacy of foreseeability in determining whether a duty exists has been echoed by numerous courts and commentators. For example, in *Beugler v. Burlington Northern & Santa Fe Ry.*, 490 F.3d 1224 (10th Cir. 2007), the Tenth Circuit Court of Appeals stated that Many factors inform the duty analysis, but the most important consideration is foreseeability. Generally a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous. Foreseeability establishes a 'zone of risk,' which is to say that it forms a basis for assessing whether the conduct creates a generalized and foreseeable risk of harming others.

*Wood v. CRST Expedited, Inc.*, 2018 WY 62, P11, 419 P.3d 503, 508 (emphasis added).

As part of the element of foreseeability, jurors are entitled to hear evidence regarding the nature and risk of Thompson's distracted driving conduct. Due to the deadly nature of distracted driving caused by cell phone use at the wheel, federal law prohibits use of hand held mobile telephones while operating a commercial motor vehicle and no motor carrier shall allow or require a driver to use mobile phones while

driving. See 49 CFR 392.82. Killpack Trucking Inc. (herein "Killpack") had a similar policy against cell phone use while driving. Thompson's possession (and potential use) of many cell phones relates to his compliance (or lack thereof) with federal law and Killpack's policy. Thompson had an addiction to cell phone use and he had multiple phones within his reach to feed that addiction.

Thompson's call detail record for the one phone for which he actually provided the phone number, showed persistent user activities (calls, texts, and data use by Thompson) for the time frame of December 13, 2016, through December 14, 2016, (the date of the crash) with few breaks in activity. See the report of Charles Faulk, Doc. 64-4, p. 1, ¶ 3. Thompson had 117 calls, texts, and data events between December 13, 2016, at 00:15 and December 14, 2016, at 13:05. [Doc. 64-4, p. 1, ¶5]. This phone activity is consistent with the statement that Thompson made to Trooper King about checking a text message right before the crash, versus his later deposition testimony about looking at the time on his phone (when there were several other display clocks available to see to check the time).

During the time frame of December 1-15, 2016, there were only 11 periods of inactivity were in excess of 4 hours. [Doc. 64-4, p. 2, ¶ 8]. None of the periods of inactivity were in excess of 5 hours. In other words, Thompson was using at least one of his phones (if not more) for 19 to 20 hours per day on average. [Doc. 64-4, p. 2, ¶ 8]. On December 14, 2016, the date of the crash, phone activity was reported while Thompson's commercial tractor was in motion as reported in the GPS record. [Doc. 64-4, p. 3, ¶11]. This is relevant evidence relating to foreseeability and the zone of risk.

Since the Defendants shockingly claim that they are unaware of the whereabouts of the multiple cell phones, there is no way to verify which cell phones were working and how or what each phone was being used for by Thompson. Thompson has asserted that he only had one operational cell phone. Defendants also have not produced any concrete evidence to prove the other phones were broken and useless. If Defendants had produced any evidence regarding the other phones, such as the phones themselves, the other phone numbers, and/or the call data for the other phones, Thompson's phone addiction could have been proven to be much worse than has already been demonstrated. Here, the probative and relevant value of Thompson's potential use of multiple cell phones while driving outweighs any potential prejudice. The Plaintiffs' case will be unduly prejudiced if this information is wrongfully withheld from the jury.

Foreseeability of the risk involves providing to the jury the admissible evidence of the reasons why and how Thompson was driving in a distracted manner. As part of their investigation, the Troopers found that multiple cell phones had a likely role to play in Thompson's distracted driving. Within the foreseeability zone of risk of the crash is the analysis by the jury of Thompson's distraction from the ringing, text message pings, or data use, from several cell phones while operating his tractor trailer on the highways, endangering other motorists.

The jury must also be able to assess the self-serving statement of Thompson that only one phone was working, when Defendants have chosen to withhold information on the location of any of the cell phones, the phone numbers of the other cell phones, the carriers of the other cell phones, or the make and model of the other cell phones.

Defendants must not be rewarded for their withholding of likely damaging evidence. The jury is entitled to hear this evidence regarding credibility and foreseeability. Therefore, pursuant to *F.R.E. 401, 402, 403, 406, and 611*, any comments, statements or arguments about Thompson's multiple cell phones must be allowed to be presented to the jury.

### CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendants' motion in limine be denied regarding the existence of Thompson's multiple cell phones.

Dated this 30th day of July 2020.

Attorney for Plaintiff Lemmings:

/s/ Michele R. Levine

Linnell, Newhall, Martin & Schulke, P.C.

### Appendices

1. Trooper Robert King's Affidavit
2. Trooper Tyler Matheney Report
3. Thompson Deposition Excerpts

CLERK OF DISTRICT COURT  
TITUS COUNTY

2021 APR -8 PM 4:33

FILED  
BY [Signature]  
DEPUTY

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

THE STATE OF MONTANA,

Plaintiff,

vs.

RICHARD WAYNE SPARKS,

Defendant.

Cause No. ADC-07-085

**EVIDENTIARY AND  
DISPOSITIONAL ORDER,  
ORDER TO CLOSE FILE, and  
ORDER EXONERATING BOND**

On April 6, 2021, the date set for an evidentiary hearing, the above-named Defendant appeared in person and was represented by his counsel, Matt McKittrick. The State was represented by Deputy County Attorney Susan Weber. All parties appeared by Zoom.

Mr. McKittrick advised the Court the Defendant would plead TRUE to the allegations contained in the report of violation. Mr. McKittrick moved the Court to bifurcate the evidentiary and dispositional hearings or stay the execution of the disposition until the Defendant has been sentenced in Butte-Silver Bow County. Ms. Weber objected to bifurcation or staying the execution of the disposition, given the violent nature of the allegations contained in the report of violation.

1. The Defendant stated his true name to the Court and was duly sworn and testified in his own behalf. The Defendant withdrew his NOT TRUE answers and answered TRUE to

violating the following violations of Court and/or Parole conditions contained in the Report of Violation dated September 25, 2020:

- a. **Count I, Laws & Conduct – non-compliance violation.** Count I is a violation of probation conditions requiring compliance with all laws. Defendant violated laws and conduct by being charged with partner or family member assault on September 6, 2020.
- b. **Count II, Laws & Conduct – non-compliance violation.** Count II is a violation of probation conditions requiring compliance with all laws. Defendant violated laws and conduct on September 18, 2020, for incurring new charges for assault with a weapon (a firearm), criminal endangerment, and partner family member assault.

The Court accepted the Defendant's change of answers and proceeded to disposition.

Counsel gave their recommendations to the Court. Both the State and the Defendant recommended 10 years at the Montana State Prison with no time suspended. The Defendant was duly sworn and testified on his own behalf regarding his reasons for wanting a stay of execution of the disposition, to allow time for receipt of social security disability benefits.

Jerry Finley, Adult Probation and Parole Officer, was duly sworn and testified on behalf of the State, regarding the Defendant's poor adjustment to supervision and the violent nature of Defendant's pending charges.

The Defendant made a statement to the Court.

No legal reason was given why sentence should not be pronounced. The Court renders its judgment as follows:

IT IS HEREBY ORDERED that for the underlying offenses of **COUNT I: ESCAPE, Felony**, and **COUNT II: THEFT, Felony**, the Court revoked the Defendant's previous sentence and sentenced the Defendant to **ten (10) years to the Montana State Prison**. The Defendant is given credit for 196 days for jail time already served and 354 days for street time.



The Court DENIED the Defendant's motion to stay execution of the disposition and ORDERED the Defendant to report to the Butte-Silver Bow County jail no later than April 6, 2021, at 5:00 p.m. The Court executed an Order of Incarceration.

The reasons for this sentence are:

1. The Defendant failed to comply with the conditions of his probation.
2. The Court considered the violent nature of the offense and the difficulty in attempts to rehabilitate the Defendant.

THE CLERK IS DIRECTED TO CLOSE THE FILE.

ANY BOND IN THE CASE SHALL BE EXONERATED.

DATED this 6th day of April, 2021.

*Michele R. Levine*

MICHELE R. LEVINE  
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

This is to certify that the foregoing was duly served by mail upon counsel of record at their address this 12th day of April, 2021

TINA HENRY, CLERK OF COURT  
By *[Signature]* DEPUTY

c: CA/Susan Weber  
DC/Matt McKittrick  
Defendant c/o counsel  
CCSO  
GFPD  
STID  
Department of Corrections/Montana State Prison  
Adult Probation and Parole